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No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE UNIVERSITY OF TENNESSEE,
Petitioner,

v.

DENNIS ALLEN FAULKNER,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

BEAUCHAMP E. BROGAN *
General Counsel
CATHERINE S. MIZELL
Deputy General Counsel
ALICE M. WOODY
Assistant General Counsel
THE UNIVERSITY OF TENNESSEE
719 Andy Holt Tower
Knoxville, Tennessee 37996-0170
(615) 974-3245
Attorneys for Petitioner

* Counsel of Record

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QUESTION PRESENTED

The Supreme Court of Alabama has held that an Alabama state court has jurisdiction to enter an injunction and a declaratory judgment against The University of Tennessee, an agency of the State of Tennessee, prohibiting the University from acting within Tennessee to rescind a University degree because of plagiarism, even though Alabama law would bar the same action against an agency of the State of Alabama.

The question presented is whether the Full Faith and Credit Clause of the United States Constitution requires a state court to recognize the sovereign immunity of a sister state in an action challenging the sister state's authority to carry out a sovereign responsibility within its own borders, when the forum's law of sovereign immunity would bar the same action against the forum state.

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PETITION FOR A WRIT OF CERTIORARI

The University of Tennessee, an educational agency of the State of Tennessee, petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama entered on August 28, 1992, but stayed until denial of the University's timely motion for a rehearing on September 3, 1993.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama has not been released for publication. A copy of the slip opinion is reprinted in the Appendix at 1a-11a.

The memorandum decision of the Circuit Court of Madison County, Alabama, has not been reported. It is reprinted in the Appendix at 12a-13a.

JURISDICTION

The Supreme Court of Alabama entered judgment on August 28, 1992. Petitioner filed a timely application for rehearing on September 11, 1992. The Supreme Court of Alabama denied the application for rehearing on September 3, 1993. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

U.S. Const. art. IV, § 1. *The Full Faith and Credit Clause*:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

Tenn. Code Ann. § 20-13-102 (1980). *Tennessee's Sovereign Immunity Statute*:

> (a) No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.
>
> (b) No statutory or other provision authorizing the University of Tennessee and its board of trustees to sue and be sued shall constitute a waiver of sovereign immunity.

Ala. Const. of 1901, art. I, § 14. *Alabama's Sovereign Immunity Clause*:

> That the State of Alabama never be made a defendant in any court of law or equity.

STATEMENT OF THE CASE

This action in an Alabama state court arose out of The University of Tennessee's initiation of proceedings in Tennessee to rescind Dennis Faulkner's doctoral degree because of plagiarism in his dissertation. In reversing the lower court's order dismissing the action, the Supreme Court of Alabama held that an Alabama state court has jurisdiction to enter an injunction and a declaratory judgment prohibiting the University from rescinding Faulkner's degree.

Petitioner, The University of Tennessee ("University"), is an educational agency of the State of Tennessee. The Tennessee Legislature has granted the president, faculty, and governing board of the University power to confer a degree on "any student . . . they may think proper . . . ." Tenn. Code Ann. § 49-9-209(f) (1990). Under Tenn. Code Ann. § 20-13-102 (1980), the University has sovereign immunity from suit in Tennessee courts.[1]

Respondent, Dennis Faulkner ("Faulkner"), a resident of the State of Alabama, enrolled in a doctoral degree program offered by The University of Tennessee at its Space Institute in Tullahoma, Tennessee. The University operates the Space Institute under statutory authority granted by the Tennessee Legislature to carry out the following educational and research services:

> (1) . . . train students in science and engineering at the master's, doctoral and post-doctoral level;

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[1] The University also has the State of Tennessee's immunity in federal court under the Eleventh Amendment. *E.g., Jain v. University of Tennessee at Martin*, 670 F. Supp. 1388 (W.D. Tenn. 1987), *aff'd*, 843 F.2d 1391 (6th Cir.), *cert. denied*, 488 U.S. 827 (1988); *Fireman's Fund Ins. Co. v. Bell Helicopter Textron, Inc.*, 667 F. Supp. 583 (E.D. Tenn. 1987). Furthermore, as an agency of the State of Tennessee, the University is not a "citizen" for the purpose of diversity jurisdiction. *University of Tennessee v. United States Fidelity & Guaranty Co.*, 670 F. Supp. 1379 (E.D. Tenn. 1987).

> (2) Attract outstanding teachers, students and research workers interested in work related to aerospace science and engineering;
>
> (3) Contract with both governmental and private agencies for research; and
>
> (4) Provide services to aerospace industries through research and through education and training of potential workers.

Tenn. Code Ann. § 49-9-601(a) (1990).[2]

At the time of his enrollment in The University of Tennessee, Faulkner was a full-time employee of the Department of the Army at the Redstone Arsenal in Huntsville, Alabama, located less than two hours from the Space Institute in Tullahoma. Through extended learning services offered by the University to the Army, NASA, and the rest of the aerospace community in Huntsville, Faulkner was able to take all courses toward the doctoral degree by videotape or live lecture in Huntsville, and thereby continue his full-time employment at the Redstone Arsenal. In addition, Faulkner's actions to assemble the document he submitted as a dissertation took place primarily in Huntsville—not pursuant to any University requirement, but rather as a matter of his own choice and convenience.

Ultimately, however, Faulkner presented the dissertation to his major professor at the Space Institute in Tullahoma, Tennessee, and defended it before a faculty committee there. Faulkner then submitted the dissertation to the University in Knoxville, Tennessee, in pur-

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[2] The Alabama Supreme Court erroneously characterized the University's relationship with the areospace community in Huntsville as "commercial activities." App. at 8a. In fact, however, the University's activities in Huntsville represent the exercise of its statutory authority to carry out educational and research programs beneficial to federal agencies and private entities engaged in aerospace science and engineering.

ported satisfaction of the University's degree requirements. With Faulkner in attendance, the University conferred a Doctor of Philosophy degree on Faulkner at a commencement ceremony held in Knoxville, Tennessee, on May 11, 1990.

Later, the University discovered that Faulkner's dissertation was essentially a verbatim copy of parts of four reports written by other persons. The dissertation included no attribution to the true authors.[3] After University faculty in Tullahoma and Knoxville, Tennessee, reviewed the dissertation and compared it with the reports written by others, the University notified Faulkner on April 4, 1991, of its intention to initiate proceedings in Tennessee to rescind his degree if he could not demonstrate clearly that the dissertation represented his original work. The University also offered Faulkner the opportunity to surrender his degree voluntarily. App. at 38a-40a. On May 3, 1991, Faulkner filed this action in the Circuit Court of Madison County, Alabama.

Faulkner's Alabama state court action purports to state a cause of action on grounds of estoppel, breach of contract, and fraud. In addition to monetary relief, Faulkner's suit seeks a preliminary and permanent injunction restraining the University from taking any action to rescind Faulkner's University of Tennessee degree. Faulkner's suit further asks an Alabama state court to enter the following declaratory judgment:

> . . . that the defendant is estopped to deny the plaintiff's satisfactory completion of all requirements for the degree of Doctor of Philosophy awarded to him

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[3] Faulkner's complaint in the Alabama state court admits that he incorporated substantial portions of the reports into the dissertation without citing the reports. Faulkner seeks to excuse his plagiarism by alleging that his major professor gave him the reports and approved the manner in which he used them in the dissertation. App. at 16a-17a.

> and to take any action in revocation or disparagement of the said degree;
>
> . . . .
>
> . . . that the defendant's denial of the plaintiff's satisfactory completion of all requirements for the degree of Doctor of Philosophy awarded to him, and any action in advancement of the revocation or disparagement of the said degree, is a breach of the contract between the defendant UT and the plaintiff;
>
> . . . .
>
> . . . that the defendant's denial of the plaintiff's satisfactory completion of all requirements for the degree of Doctor of Philosophy to him and any action in revocation or disparagement of the said degree is a fraud upon the plaintiff.

App. at 22a, 23a, 25a.

The University moved to dismiss Faulkner's complaint on various grounds, including lack of subject matter jurisdiction because of the University's sovereign immunity, failure to exhaust administrative remedies, and ripeness. App. at 30a-32a. On July 1, 1991, the Alabama Circuit Court entered an order dismissing the action for failure to exhaust administrative remedies and absence of a justiciable controversy. App. at 12a-13a.

In his direct appeal to the Supreme Court of Alabama, Faulkner raised the issue of the University's sovereign immunity. The University responded that the Full Faith and Credit Clause of the United States Constitution requires Alabama courts to recognize the University's sovereign immunity against an action challenging the University's authority to carry out a sovereign responsibility, especially when Alabama's own law of sovereign immunity would bar the same action against an Alabama state university.

With one justice dissenting, the Supreme Court of Alabama reversed the lower court's order of dismissal,

holding that Alabama's exhaustion of remedies doctrine does not apply in this case because The University of Tennessee is not an agency of the State of Alabama. The court further held that the Full Faith and Credit Clause does not require Alabama to recognize The University of Tennessee's sovereign immunity, and then refused to do so as a matter of discretion under the doctrine of comity. In refusing to recognize the University's immunity, the Supreme Court of Alabama expressly acknowledged that Alabama's law of sovereign immunity would bar this same action against an Alabama state university. App. at 6a-8a.[4]

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF ALABAMA HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), expressly reserved an important constitutional question not presented by the facts of that case—whether the Full Faith and Credit Clause requires a state court to recognize the sovereign immunity of a sister state in an

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[4] The majority opinion of the Alabama Supreme Court plainly erred in suggesting that no administrative remedy was available to Faulkner in Tennessee to challenge the proposed rescission of his degree. App. at 6a-7a. The opinion of the dissenting justice outlines the extensive procedure available to Faulkner under the Tennessee Administrative Procedures Act to contest the rescission of his degree *before* the rescission could occur. App. at 10a-11a. In addition to the procedural protections of a trial-like hearing, the Tennessee Administrative Procedures Act provides the right of judicial review in chancery court and the right of appeal to the Tennessee Court of Appeals. Tenn. Code Ann. § 4-5-322, -323 (1991).

The procedures available to Faulkner for challenging the revocation of his degree in Tennessee are virtually the same as those which would be available under the Alabama Administrative Procedures Act, Ala. Code §§ 41-22-1 *et. seq.* (1991), to someone challenging an Alabama state university's action to rescind a degree.

action which interferes with the capacity of the sister state to carry out a sovereign responsibility. *Id.* at 424 n.24. The Supreme Court of Alabama now has answered that question by holding, in effect, that the Full Faith and Credit Clause never requires a state court to recognize the sovereign immunity of a sister state—*not even when the suit represents a direct challenge to the sister state's authority to carry out a sovereign responsibility within its own borders.* Furthermore, making its decision on this important federal question all the more extraordinary, the Supreme Court of Alabama admits that its own law of sovereign immunity would bar this same action against an Alabama state university. And finally, the Supreme Court of Alabama reaches this remarkable result by relying on a single sentence from part of the *Hall* opinion which does not even address the full faith and credit issue.

If the Supreme Court of Alabama had considered carefully this Court's analysis of the Full Faith and Credit Clause in *Hall*, it could have concluded only that *Hall* does not answer the question presented in this case. Stated even in its broadest form, *Hall* holds only that the Full Faith and Credit Clause does not require one state to recognize the sovereign immunity of another state "in violation of its own legitimate public policy." *Id.* at 422. Applying this principle to the circumstances presented in *Hall*, the Court found that requiring California to recognize Nevada's sovereign immunity in a tort action arising out of a traffic accident in California would be "obnoxious" to California's policies providing for "full protection to those who are injured on its highways through the negligence of both residents and nonresidents." *Id.* at 424. California's policies were based in statutes providing for jurisdiction over nonresident motorists and an unequivocal waiver of California's own sovereign immunity from liability in tort actions. *Id.* In the following strategically placed footnote, however, the Court carefully lim-

ited its full faith and credit holding to the facts of *Hall* and reserved the question presented in this case:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result.

Id. at n.24.

The Court's disclaimer in footnote 24 recognizes that the Full Faith and Credit Clause may impose greater limits on a forum state's choice of law when the suit implicates a sister state's capacity to fulfill its sovereign responsibilities. Furthermore, the Court's reference to "different state policies, either of California or of Nevada," *id.*, indicates that if California had not waived its immunity from tort actions in its own courts, full faith and credit might require a different result.[5] Thus, either of two circumstances not present in *Hall* would invoke the federalism concerns expressed in footnote 24: when a suit challenges a sister state's authority to act in a sovereign capacity; or when the forum state affords itself sovereign immunity but refuses to recognize the immunity

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[5] Nevada too had waived its immunity from tort actions in Nevada state courts, subject to a maximum recovery of $25,000. *Id.* at 412 n.2. Thus, the Court's reference to "different state policies, either of California or of Nevada," *id.* at 424 n.24, also suggests that a different full faith and credit analysis and result might be required —notwithstanding California's full recovery policies—if Nevada simply had not enacted a limited waiver of sovereign immunity in its own courts. The circumstances here present the most compelling case for recognition of the foreign state's sovereign immunity because neither state has waived immunity in its own courts, to any extent, for the kind of action Faulkner seeks to bring against The University of Tennessee.

of a sister state. When the confluence of these circumstances occurs, as it does in the present case, a different analysis and a different result from that reached in *Hall* surely are required.[6]

Unlike the traffic accident suit at issue in *Hall*, Faulkner's suit represents a direct interference with the State of Tennessee's "capacity to fulfill its own sovereign responsibilities," *id.*, within its own borders.[7] The State of Tennessee created The University of Tennessee to carry out the sovereign function of education. *University of Tennessee v. People's Bank*, 6 S.W.2d 328 (Tenn. 1928). The Tennessee Legislature has endowed the University with specific power to grant academic degrees. Tenn.

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[6] In the post-*Hall* state court decision most analogous to the circumstances of this case, an appellate court in New Jersey concluded that *Hall* does not sanction suits in which the governmental authority of the state being sued is at issue. *Guarini v. New York*, 521 A.2d 1362 (N.J. Super. Ct. Ch. Div.), *aff'd*, 521 A.2d 1294 (N.J. Super. Ct. App. Div. 1986), *cert. denied*, 484 U.S. 817 (1987). In *Guarini*, New Jersey plaintiffs filed suit in New Jersey seeking a declaratory judgment and an injunction against the State of New York's exercise of sovereign powers with respect to Ellis Island, where the Statue of Liberty is located. Both New York and New Jersey have sovereign immunity in their own courts against the kind of action in question. Citing footnote 24 of the majority opinion in *Hall*, the court concluded that a "different analysis" and a "different result" are required when a suit challenges the governmental authority of a sister state. *Guarini, supra* at 1367. Because the suit would interfere with New York's capacity to fulfill its sovereign responsibilities, the New Jersey court held the suit barred by New York's sovereign immunity. *Id.* at 1368.

[7] The traffic accident in *Hall* occurred outside the state whose sovereign immunity was at issue. In this case, however, all actions toward the rescission of Faulkner's degree have occurred or will occur in Tennessee. Faulkner's act of plagiarism itself occurred in Tennessee when he submitted the dissertation to the University as his own work. Furthermore, the traffic accident victims in *Hall* had no control over the fact that their tortfeasor was a foreign sovereign. Faulkner, on the other hand, freely chose to enroll in a state university in Tennessee to take advantage of a program which allowed him to continue his full-time employment in Alabama.

Code Ann. § 49-9-209(f) (1990). Faulkner's suit challenges the University's authority to determine for itself, through administrative proceedings wholly within the State of Tennessee, whether Faulkner has satisfied the University's requirements for a degree. Faulkner's suit directly interferes with the University's capacity to fulfill its degree-granting responsibilities in two ways. First, Faulkner seeks a preliminary and permanent injunction to restrain the University from exercising its academic judgment to rescind the degree in question.[8] Second, Faulkner asks an Alabama state court to enter a declaratory judgment to the effect that Faulkner has satisfied all requirements for a Doctor of Philosophy degree from The University of Tennessee. If the Alabama Supreme Court's decision in this case is allowed to stand, the Alabama judiciary will supplant The University of Tennessee as the final arbiter of Dennis Faulkner's qualifications for a degree from The University of Tennessee. There could hardly be a more direct interference with a state's "capacity to fulfill its own sovereign responsibilities" or a more "substantial threat to our constitutional system of cooperative federalism." *Hall, supra* at 424 n.24.

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[8] The power to rescind a degree is a necessary incident of the power to grant it in the first place. *See Hand v. Matchett*, 957 F.2d 791 (10th Cir. 1992); *Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987); *Waliga v. Board of Trustees*, 488 N.E.2d 850 (Ohio 1986). In *Waliga*, the Ohio Supreme Court articulated the significance of the power to rescind a degree in the following way:

> Academic degrees are a university's certification to the world at large of the recipient's educational achievement and fulfillment of the institution's standards. To hold that a university may never withdraw a degree, effectively requires the university to continue making a false certification to the public at large of the accomplishment of persons who in fact lack the very qualifications that are certified. Such a holding would undermine public confidence in the integrity of degrees, call academic standards into question, and harm those who rely on the certification which the degree represents.

Waliga, supra at 852.

Compounding the threat to federalism presented by the nature of Faulkner's suit is the fact that Alabama's own law of sovereign immunity would bar this same action against an Alabama state university. Article I, § 14, of the Alabama Constitution provides that "the State of Alabama shall never be made a defendant in any court of law or equity," and this immunity extends to its state universities. *See Sarradett v. University of South Alabama Medical Center*, 484 So.2d 426 (Ala. 1986); *Taylor v. Troy State University*, 437 So.2d 472, 474 (Ala. 1983); *Ellison v. Abbott*, 337 So.2d 756, 757 (Ala. 1976). Thus, by failing to recognize Tennessee's sovereign immunity, the Alabama Supreme Court is treating a sister state agency differently than one of its own solely because of the agency's foreign status. This discriminatory treatment of another sovereign is precisely the kind of "parochial entrenchment" the Full Faith and Credit Clause was designed to prevent. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 n.10 (1981) (Stevens, J., concurring); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980).

Furthermore, by ignoring Tennessee's sovereign immunity, the Alabama Supreme Court has chosen to treat a sovereign state just like a private litigant. This refusal to give equal respect to an equal sovereign offends the most fundamental notions of full faith and credit:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation . . . .

Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935) (Stone, J.)

In this Court's recent choice of law decisions, Justice Stevens, who wrote for the majority in *Hall*, has contin-

ued to emphasize the role of the Full Faith and Credit Clause in securing respect for state sovereignty. In *Allstate Ins. Co. v. Hague,* 449 U.S. 302 (1981), Justice Stevens' concurring opinion notes that the Full Faith and Credit Clause obligates every state to "respect the legitimate interests of other States and avoid infringement upon their sovereignty." *Id.* at 322. Justice Stevens concurred in the judgment in *Hague* only after finding that failure to apply foreign law posed no "direct or indirect threat" to the foreign state's sovereignty. *Id.* at 325. Concurring again in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 843 (1985), Justice Stevens repeated his admonition concerning respect for state sovereignty, this time citing footnote 24 of the majority opinion in *Hall.*

The federalism concerns that Justice Stevens expressed in *Hague* and *Shutts* are present to a significantly greater degree in this case where one of the litigants is a sister state, and the suit in question challenges the sister state's authority to act in a sovereign capacity within its own borders. In this case, Alabama's refusal to apply Tennessee's sovereign immunity law does much more than frustrate a public policy of Tennessee; it directly interferes with the State of Tennessee's capacity to fulfill its sovereign responsibilities within the State of Tennessee. *See Sovereign Immunity in Sister-State Courts: Full Faith and Credit and Federal Common Law Solutions,* 80 Colum. L. Rev. 1493, 1502 (1980).

The Full Faith and Credit Clause and the principles of federalism it embodies were of no concern to the Supreme Court of Alabama, however. The Alabama court was interested only in providing a remedy for an Alabama plaintiff against a Tennessee sovereign—a remedy the plaintiff could not have had against an Alabama sovereign. The blatant parochialism reflected in the decision of the Supreme Court of Alabama fully validates the concern expressed by Justice Blackmun, dissenting in *Hall,* that states would rely on *Hall* to treat other states like private

litigants rather than like sovereigns. *Hall, supra* at 427. The decision also validates Justice Blackmun's prediction that footnote 24 of the majority opinion would not be effective to limit the holding to "traffic-accident torts committed outside the defendant State . . . ." *Id.* at 429. Indeed, if left unchecked, the decision of the Alabama Supreme Court will allow an Alabama court to restrain The University of Tennessee from carrying out a sovereign responsibility wholly within the borders of Tennessee.

Because the Supreme Court of Alabama virtually ignored the federalism concerns present in this case, it simply must not have the final say on the full faith and credit question presented here. This Court has recognized that it "must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493, 502 (1939). When the choice of law issue involves a sovereign state as a litigant, the importance of this Court's role in defining the limits of full faith and credit is paramount. This Court must determine for itself the circumstances under which the principles of cooperative federalism embodied in the Full Faith and Credit Clause may require a forum state to recognize the sovereign immunity of a sister state.

II. THE DECISION OF THE SUPREME COURT OF ALABAMA HAS THREATENING IMPLICATIONS FOR ALL STATE INSTITUTIONS OF HIGHER EDUCATION.

The threat to federalism presented by the Alabama Supreme Court's decision reaches beyond the disharmony created between the two states directly involved. Although the seed of discord sown between Tennessee and Alabama is enough, standing alone, to warrant this Court's

review of this important full faith and credit question, the prospect of this Alabama decision guiding the decisions of forty-nine other state courts punctuates the need for this Court's intervention. No reported decision of any other state court has relied on *Hall* to take so bold a stand as Alabama has in favor of parochial state interests, and against the interests of federalism, in a suit challenging the capacity of a sister state to carry out a sovereign responsibility within its own borders. Therefore, if this Court does not review the decision of the Alabama Supreme Court in this case, state courts outside of Alabama will look to the Alabama decision as persuasive authority on this important constitutional question.[9]

Recognizing the threat posed by the Alabama Supreme Court's decision, The University of Alabama and Auburn University joined the University's application for rehear-

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[9] If allowed to stand, the decision of the Alabama Supreme Court will encourage similar foreign state court challenges to the authority of state institutions of higher education to make academic judgments they are specifically empowered to make under their own state laws. Correspondence courses and other extended learning services for students residing in other states are standard fare in the curriculum of state institutions of higher education. Given the relative ease with which personal jurisdiction now may be obtained over a nonresident defendant, an out-of-state student participating in an extension program through any state university could rely on this Alabama decision to hale the university into court in his or her home state to defend any exercise of academic judgment. Indeed, the impact of this decision may not be limited to extended learning programs. If the mere fact of recruiting and enrolling an out-of-state student is sufficient contact to subject a university to personal jurisdiction in a foreign state with respect to any cause of action arising out of the contract of enrollment, *see, e.g., Hahn v. Vermont Law School*, 698 F.2d 48 (1st Cir. 1983), and if states are not required to afford sister states the same immunity to which they themselves are entitled, state universities could find themselves defending academic judgments in the courts of every state from which they enroll students.

ing before the Alabama Supreme Court as *amici curiae*. App. at 41a-44a. In addition to disagreeing with the court's refusal to require Faulkner to exhaust the administrative remedy available to him in Tennessee, these Alabama state universities expressed grave concern about the implications of the decision for their own sovereign immunity in foreign state courts:

> . . . Auburn and Alabama have a compelling interest in attempting to ensure that foreign jurisdictions recognize the sovereign immunity of this state. Auburn and Alabama, like most large universities have occasion to conduct substantial activity outside of the state of Alabama. To the extent that Alabama courts fail to recognize the immunity afforded foreign states under their law, we can expect foreign forums to fail to recognize Alabama immunity when litigation is brought against Alabama in a foreign jurisdiction.

App. at 42a.

If state universities cannot rely on their sovereign immunity to defeat foreign state court actions which challenge their authority to fulfill academic responsibilities, they may choose to eliminate some interstate activities. In doing so, they will deprive other states of programs and services beneficial to their citizens. Indeed, the "Balkanization" in state relationships predicted by Justice Rehnquist, dissenting in *Hall, supra* at 443, is all the more likely to occur if what is at stake is a state's capacity to fulfill its sovereign responsibilities within its own borders, rather than its liability for a traffic accident in another state. Blinded, perhaps, by its parochial interest, the Alabama Supreme Court utterly failed to recognize that a suit challenging a sister state's authority to act in a sovereign capacity within its own borders presents a "substantial threat to our constitutional system of cooperative federalism." *Id.* at 424 n.24. The Alabama Su-

preme Court's failure to recognize and protect the interests of federalism must not go unchecked by this Court.

CONCLUSION

For the reasons stated in this Petition, this Court should issue a Writ of Certiorari to review the judgment of the Supreme Court of Alabama.

Respectfully submitted,

BEAUCHAMP E. BROGAN *
General Counsel
CATHERINE S. MIZELL
Deputy General Counsel
ALICE M. WOODY
Assistant General Counsel
THE UNIVERSITY OF TENNESSEE
719 Andy Holt Tower
Knoxville, Tennessee 37996-0170
(615) 974-3245
Attorneys for Petitioner

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* Counsel of Record

APPENDIX

APPENDIX

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1992

1901558

DENNIS ALLEN FAULKNER

v.

THE UNIVERSITY OF TENNESSEE

Appeal from Madison Circuit Court
(CV-91-0960)

KENNEDY, JUSTICE.

The plaintiff, Dennis Allen Faulkner, appeals from a judgment entered in favor of the defendant, the University of Tennessee ("UT"), on its motion to dismiss.

This case involves UT's actions directed toward the revocation of a doctoral degree it conferred upon Faulkner in 1989. The issue underlying this appeal is whether the trial court erred in determining that it lacked the jurisdiction to hear this case.

The record indicates that in 1987, associated with his employment with the United States Army at Redstone Arsenal in Huntsville, Faulkner commenced work in Huntsville toward a doctoral degree from UT's Space Institute.

According to the affidavit of Faulkner's UT faculty advisor, Dr. Walter Frost, graduate student programs

have been conducted in the Huntsville area by UT's Space Institute for several years. Dr. Frost stated that UT's involvement with graduate students in the Huntsville area has occurred because of a sponsorship agreement between UT and the Federal Government. Dr. Frost stated that he and other UT professors were encouraged by UT to actively recruit students from the technical community within Huntsville, particularly those employed by the Department of the Army or by NASA.

The record indicates that the Army and NASA, together, have paid in excess of $100,000 to UT over the last five years to sponsor such employee students for instruction by UT in Huntsville.

Both Dr. Frost and Faulkner stated that UT also has a number of commercial contracts with NASA and the Army in Huntsville, including UT's involvement in a joint venture with another entity that has been awarded a multi-million dollar contract with NASA. According to Faulkner, UT has also been a participant and sponsor of an annual Huntsville-based trade show.

The affidavits of Dr. Frost, Faulkner, and another UT professor, Dr. Robert Turner, indicate that almost all of Faulkner's course work was completed in Huntsville, where UT held both live and video-taped lectures.

Also, the record indicates that as part of his degree program, Faulkner commenced work on a dissertation in Huntsville. According to Faulkner, after he had completed considerable work on the dissertation, Dr. Frost and others advised him that he would have to abandon that work because it involved data that the Federal Government had decided to "classify." Faulkner alleges that Dr. Frost thereafter suggested that Faulkner write a dissertation based on reports written by others, co-authored by Frost (the "Frost reports"). Faulkner's affidavit indicates that he then commenced preparation of a second dissertation based on the Frost reports, working under the close supervision of Dr. Frost. According to Faulkner, he

worked under the guidance of Dr. Frost, in Huntsville, "through innumerable revisions . . . [and] incorporated therein substantial portions of the reports provided him by Frost, as was readily apparent to and authorized by Frost, ultimately without citation to said reports." Faulkner says that while he was preparing it he also consulted Dr. Turner regarding the circumstances of his preparation of this dissertation.

Dr. Turner, Dr. Frost, and three other UT professors made up a faculty panel that was to accept or reject the dissertation as fulfillment of a degree requirement. The record indicates that Drs. Frost and Turner, as well as the other panel members, read Faulkner's completed dissertation and, in Tennessee, orally examined Faulkner regarding it. According to Faulkner, he explained to the panel the circumstances of his preparation of the dissertation. It is undisputed that this panel, including Dr. Frost, approved the dissertation in satisfaction of a degree requirement and that Faulkner, having completed all other degree requirements, was awarded a doctor of philosophy degree from UT in May 1989.

The record indicates that approximately a year later, the dean of UT's graduate school in Knoxville, Tennessee, Dr. C.W. Minkel, wrote Faulkner, stating "[W]e . . . plan to proceed with the withdrawal of your . . . degree." According to Dr. Minkel's letter, another UT faculty panel had, after Faulkner's graduation, "judged [Faulkner's] dissertation to lack evidence of original work and to constitute essentially a duplication of material in the [Frost] reports." Dr. Minkel added that Faulkner could "proceed in either of two ways." Dr. Minkel stated that Faulkner could voluntarily relinquish his degree or wait for UT's formal, faculty panel request that the degree be rescinded, but that "[i]n either case, a notation would be placed on your transcript . . . that the degree has been rescinded." Dr. Minkel concluded this letter by advising Faulkner that if he desired, UT would afford him a hear-

ing at which he would have the opportunity to prove UT wrong. UT suggests that this hearing would be before UT representatives.

Faulkner declined to surrender his degree, and he refused the proffered hearing, which he characterizes as a "star chamber review."

Faulkner sued UT in the Circuit Court of Madison County, seeking damages and declaratory and injunctive relief. Faulkner asserted fraud, breach of contract, and estoppel. He alleged that he had been forced by UT's actions to forgo the pursuit of beneficial career changes and stated that if UT continued in its stated plan of action he would suffer irreparable harm, professionally and otherwise.

UT moved to dismiss Faulkner's complaint, arguing that the trial court lacked jurisdiction over the case. In substance, the trial court agreed and entered what it called a summary judgment in favor of UT.

We note, at the outset, that a court cannot enter a judgment on the merits against a party after finding that it lacks jurisdiction, because it cannot effectively find that it has no authority to adjudicate a claim, and then proceed to adjudicate the claim anyway. In *McMillon v. Hunter,* 439 So.2d 153 (Ala. 1983), we emphasized that judgments based on defects in jurisdiction abate, but do not bar, an action. We stated that a "summary judgment procedure deals with the merits" and that a judgment made on jurisdictional grounds "is not a matter for dismissal with prejudice or summary judgment." *Id.* at 154.

Faulkner argues that *any* judgment, with or without prejudice, based on a holding that jurisdiction is lacking, is incorrect. Thus, says Faulkner, rather than remanding this case for an order of dismissal without prejudice, we should remand this case for further proceedings because, he says, the trial court has jurisdiction.

Accordingly, we now turn to whether the trial court correctly concluded that it lacked jurisdiction to hear this case.

UT, in substance, asserted three bases in the trial court for its contention that the trial court lacked jurisdiction. It argues these same bases on appeal. Specifically, UT argues (1) that the trial court lacked in personam jurisdiction over UT; (2) that the trial court lacked subject matter jurisdiction over the dispute or, (3) in the alternative, that the courts of Alabama have the discretion to exercise jurisdiction over UT but should decline jurisdiction out of policy concerns.

In Personam Jurisdiction

Faulkner argues that UT's contacts with the State of Alabama are so prevalent that the existence of in personam jurisdiction is not fairly debatable.

The State of Alabama has in personam jurisdiction over an out-of-state defendant who has "sufficient contacts" with this State, i.e., such contacts "that he reasonably ought to anticipate [that] the direct consequences of his action [would] be felt by another person residing [here]." *Duke v. Young*, 496 So.2d 37, 39 (Ala. 1986); Ala. R. Civ. P. 4.2.

Reviewing all the facts and attendant circumstances of this case, we hold that the trial court had in personam jurisdiction over UT.

In the present case, it is undisputed that UT professors were conducting educational programs in Alabama and were soliciting prospective students within Alabama, for the purpose of offering educational instruction. The record indicates that these activities have occurred on a continuing basis for several years. It is further undisputed that Faulkner is and was an Alabama resident who, associated with these acts, was given considerable educational instruction in Alabama by UT faculty members and who did work in Alabama on the dissertation in question.

Here, it should have been quite foreseeable by UT that the direct consequences of its actions would be felt by one residing in Alabama, Faulkner. See *View-All, Inc. v. United Parcel Service,* 435 So.2d 1198, 1201 (Ala. 1983) (finding in personam jurisdiction to exist, where, as here, the nonresident defendants "were engaged in a substantial and continuing business within this state, and . . . the plaintiffs' claim arose out of this course of action").

Subject Matter Jurisdiction

Stated simply, subject matter jurisdiction is the authority of a court to hear a given class of cases. See *Standard Oil Co. v. Montecatini Edison,* 342 F. Supp. 125, 129 (D. Del. 1972); *Davis v. Davis,* 9 Ill.App.3d 922, 293 N.E.2d 399 (1973); *Ferree v. Ferree,* 285 Ky. 825, 149 S.W.2d 719 (1941).

UT argues that under state law exhaustion of remedies provisions and under the United States Constitution, the trial court is without the authority to hear this case.

Regarding exhaustion of remedies, UT argues that a trial court cannot have subject matter jurisdiction until such time as Faulkner exhausts administrative remedies available to him.

In some instances, a complainant is not entitled to judicial relief involving a decision of an agency of the State of Alabama unless the complainant has first exhausted his or her administrative remedes. *Ex parte Graddick,* 495 So.2d 1367 (Ala. 1986). However, our law on the subject applies to Alabama agencies. The defendant cites no authority for the proposition that Alabama's exhaustion of remedies doctrine would extend to a remedy provided by a foreign agency; nor are we persuaded by UT's arguments that under the facts of this case we should extend our doctrine to foreign agencies.

We note that before exhaustion of administrative remedies becomes an issue in any case, there must *be* a

administrative remedy available. UT points to no specific authority indicating that a cognizable administrative remedy through UT exists for persons like Faulkner.[1]

However, UT also asserts that the trial court has no authority to adjudicate a claim against it because of the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1.

In this regard, UT says that it would have sovereign immunity from this lawsuit in the State of Tennessee. It says that the Full Faith and Credit Clause requires that this immunity *must* also be extended to it by the State of Alabama.

Faulkner strenuously argues that there is no support for this proposition and states that *Nevada v. Hall, infra,* cited by UT, actually supports a conclusion contrary to that argued by UT.

As often is the case in a discussion of an issue of constitutional law, we could devote lengthy analysis and supply substantial background to this issue. However, the concepts of sovereignty implicated here are so accepted and fundamental that they do not warrant lengthy discussion.

In *Nevada v. Hall,* 440 U.S. 410 (1979), a case involving an examination of the Full Faith and Credit Clause, the United States Supreme Court stated, regarding a claim of sovereign immunity by one State within the boundares of another: "Such a claim necessarily implicates the power and authority of a second sovereign; *its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.*" *Id.* at 440 U.S. 415-16. (Emphasis added.)

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[1] UT does not raise any issue whether, in the absence of a cognizable administrative remedy through it, Dr. Minkel's letter could have created such a remedy.

Similarly, in *Pacific Employers Insurance Co. v. Industrial Accident Comm'n,* 306 U.S. 493 (1939), cited by Faulkner, the Court stated that "[f]ull faith and credit does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of the acts within it." *Id.* at 504-05.

We agree with Faulkner that the Full Faith and Credit Clause does not *require* that we extend sovereign immunity to UT.

Discretionary Jurisdiction

UT asserts, in the alternative, that the State of Alabama should, consistent with the doctrine of comity, permissively afford UT the sovereign immunity UT says that it enjoys in the State of Tennessee.

"Comity is . . . a principle of courtesy by which the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction merely out of deference and respect." *State ex rel. Speer v. Haynes,* 392 So.2d 1183, 1185 (Ala. Civ. App. 1979), *rev'd on other grounds, Ex parte Haynes,* 392 So.2d 1187 (Ala. 1980).

In determining whether to apply comity, we must remain sensitive to the rights of our own citizens and our duties and obligations to them. *Id.* We cannot, absent some overriding policy, leave Alabama residents without redress within this State, relating to alleged acts of wrongdoing by an agency of another State, where those alleged acts were associated with substantial commercial activities in Alabama. We conclude that comity is not such an overriding policy in this instance.

UT indicates that granting it sovereign immunity in this case could not be any great burden on the people of Alabama, who, it says, are accustomed to the immunity shared by instrumentalities of this State, and that to ex-

tend it to UT here would promote harmony with Tennessee.

We disagree with the suggestion that to extend sovereign immunity to UT would not be appreciably different in effect from the extension of immunity to an agency or instrumentality of the State of Alabama. Agencies of the State of Alabama are subject to legislative control, administrative oversight, and public accountability in Alabama; UT is not. Actions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in Alabama. UT, as an instrumentality of the State of Tennessee, operates outside such controls in this State.

Moreover, if, as UT suggests, comity is an extension of deference, proffered in the interest of harmony or cooperation, then logically, comity is not an issue of import here, given these considerations, unless some *disharmony* with Tennessee may result in its absence.

UT does not indicate that a failure to extend comity would result in disharmony with the State of Tennessee. Rather, UT asserts only that to extend UT sovereign immunity in this case "is consistent with notions of comity and harmonous interstate relations." That may be true, but that argument fails to address whether a failure to extend comity would be *inconsistent* with harmonious interstate relations in this instance;[2] it suggests no specific basis for denying Faulkner and other persons similarly situated a remedy in this State, in the interest of preventing disharmony.

REVERSED AND REMANDED.

Hornsby, C. J., and Madox, Almon, Shores, Adams, and Ingram, JJ., concur.

Houston, J., dissents.

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[2] It is noteworthy that UT cites no authority indicating that the courts of Tennessee would, if confronted with this situation, hold any differently than we do here.

HOUSTON, JUSTICE (dissenting).

If a fraud was committed, it was committed in Tennessee. If a contract was breached, it was breached in Tennessee. Therefore, under general principles governing choice of laws, a court should apply the law of Tennessee, no matter where this case is tried. If the University of Tennessee has sovereign immunity under the law of Tennessee, it must have sovereign immunity in the courts of Alabama. If a failure to exhaust administrative remedies in Tennessee would be a bar in Tennessee, it should be a bar in Alabama.

Educational institutions are uniquely situated to make determinations regarding academic qualifications or the lack thereof. Establishing degree requirements and granting degrees are within the province of universities, not courts; so the rescission of degrees of former students is within the province of universities, not courts. Courts, when their jurisdiction is quickened, must assure that degrees are not rescinded by universities until the former student has had all of the process due him—adequate notice, a fair opportunity to defend, and an impartial forum. The majority quotes Faulkner as characterizing the hearing he would have as "star chamber review." This is hyperbole, for I am persuaded that the Tennessee Administrative Procedures Act, Tennessee Code Annotated ("T.C.A."), § 4-5-101 et seq., afforded Faulkner all of the process he was due. T.C.A. § 4-5-312 establishes the rules of procedure by which a hearing is to be conducted, including Faulkner's right to present argument, to present witnesses, to cross-examine witnesses, and to present documentary and demonstrative evidence. He had the right to subpoena documents and witnesses in order to make prehearing discovery (T.C.A. § 4-5-311). A transcript would have been made of the proceedings, and the final decision would have been in writing and would have included findings of fact and conclusions of law. (T.C.A. § 4-5-314). If Faulkner was not satisfied, he

had the right to petition for rehearing (T.C.A. § 4-5-317). If Faulkner was still dissatisfied with the result, he had the right of immediate judicial review in the chancery court. (T.C.A. § 4-5-322). That court must review the entire record, unless the parties agree to limit the record. (T.C.A. § 4-5-322(d)). If Faulkner was not satisfied with the decision of the chancery court, he had the right of appeal to the Tennessee Court of Appeals (T.C.A. § 4-5-323). If he was still not satisfied, he could have petitioned the Tennessee Supreme Court, which is a court of grace, not of right, in such matters, just as this Court is in proceedings brought under the Alabama Administrative Procedures Act. Therefore, I am persuaded that the truth will out and that Faulkner could have received all the process he was due by letting academia be academia. My brethren are bold to try, but I feel inadequate to "seek for truth in the groves of Academe." [3]

Faulkner's failure to exhaust his administrative remedies in Tennessee provided the trial court with a sufficent reason, in my opinion, to dismiss this action. I would affirm; therefore, I dissent.

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[3] Horace, Epistles, ii: "Atque inter silvas Academi quaerere verum."

IN THE CIRCUIT COURT
OF MADISON COUNTY, ALABAMA

Civil Action No. CV91-0960B

DENNIS ALLEN FAULKNER,
Plaintiff,

v.

THE UNIVERSITY OF TENNESSEE,
Defendant.

ORDER

This matter came on for hearing on June 21, 1991, upon a Motion to Dismiss filed by the Defendant, The University of Tennessee. Thereafter, on June 25, 1991, Plaintiff filed First Amendment to Verified Complaint, and Defendant reassigned its Motion to Dismiss to the complaint, as amended. The Court has reviewed the motion filed by the Defendant, the Plaintiff's opposition thereto, the briefs filed by both sides, the affidavits filed by each side in support of their respective positions, and the Court has heard oral argument from each party. The Plaintiff through counsel concedes at said hearing that The University of Tennessee has not yet rescinded his doctoral degree. The Court finds that as stated in the letter from C. W. Minkel to the Plaintiff, dated April 4, 1991, The University of Tennessee has offered the Plaintiff the opportunity to contest the possible revocation of his doctoral degree through the exhaustion of his administrative remedies as provided by the Tennessee Administrative Procedures Act. After careful consideration of the foregoing, the Court deems that Defendant's Motion to Dismiss should be treated as a Motion for Summary Judgment. The Court finds that no justiciable controversy

exists and that the Plaintiff has failed to exhaust his administrative remedies.

Therefore, it is ORDERED, ADJUDGED and DECREED that Defendant's Motion is due to be granted. Further finding that there is no just reason for delay, this Court expressly directs entry of final judgment pursuant to Rule 54(b) of the Alabama Rules of Civil Procedure.

ENTERED this 1st day of July, 1991.

/s/ Daniel B. Banks, Jr.
DANIEL B. BANKS, JR.
Circuit Judge

IN THE SUPREME COURT OF ALABAMA

September 3, 1993

1901558

DENNIS ALLEN FAULKNER

v.

THE UNIVERSITY OF TENNESSEE
(Madison: CV-91-0960B)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

PER CURIAM—

HORNSBY, CJ., MADDOX, ALMON, SHORES, ADAMS, KENNEDY and INGRAM, JJ., CONCUR. HOUSTON, J., DISSENTS.

IN THE CIRCUIT COURT
OF MADISON COUNTY, ALABAMA

Civil Action No.

DENNIS ALLEN FAULKNER,
Plaintiff,

VS.

THE UNIVERSITY OF TENNESSEE,
Defendant.

AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The plaintiff, Dennis Allen Faulkner ("Faulkner"), hereby states his claims against the defendant, The University of Tennessee ("UT"), as follows:

1. The plaintiff is now and at all times relevant to matters averred in this Complaint was a citizen of the State of Alabama, residing in Huntsville, Madison County, Alabama. Plaintiff is over the age of 21 years.

2. Defendant UT is an incorporated educational entity under the statutory law of the State of Tennessee.

3. Through its extension campus known as The University of Tennessee Space Institute ("UTSI"), defendant UT has conducted business in the State of Alabama in Huntsville, Madison County, Alabama to-wit: The conduct of classes of instruction in and the recruitment of students from Huntsville, Alabama. In April of 1987, defendant UT, acting through C. W. Minkel ("Minkel"), Dean of the Graduate School and Vice Provost, admitted the plaintiff as a potential candidate for the Ph.D. degree with a major in engineering science, which doctoral pro-

gram was administered through UTSI. The plaintiff was so admitted as an out-of-state student and paid substantial tuition charges as well as other charges for enrollment.

4. The plaintiff's "major professor" while enrolled in the UTSI doctoral program was Dr. Walter Frost ("Frost"), who, in addition to being chairman of the Engineering Science Department, was also the elected member representing UTSI in defendant UT's Graduate Council.

5. The plaintiff remained enrolled in the aforementioned doctoral degree program from the spring quarter of 1987 through the spring quarter of 1990, and during such enrollment he did complete all requirements for eligibility to be awarded a Ph.D. in engineering science, including but not limited to all prescribed course work, examinations both written and oral, and the preparation and defense of a dissertation.

6. During the course of his doctoral program, the plaintiff had done substantial work on a dissertation which he was required to discontinue because necessary data and information upon which such dissertation was predicated became classified federal government information, thereby restricting access to and dissemination of same. Pursuant to defendant UT's policy, which was communicated to palintiff by Frost and others, dissertations were not permitted to be based upon classified information. Plaintiff was so obliged to abandon his original dissertation in or about September of 1989.

7. Unable to proceed with the preparation and submission of his first-conceived dissertation, the plaintiff consulted his major professor, Frost, and Dr. Robert Turner ("Turner"), another member of plaintiff's faculty committee, for their advice regarding his options for an alternate dissertation project.

8. Frost advised the plaintiff that he might prepare a dissertation predicated upon certain reports and data pre-

viously gathered and prepared by Frost himself and others. Frost further advised the plaintiff that such data and reports were not available to the public.

9. The plaintiff, upon the advice and recommendation of Frost, did prepare his dissertation based upon the data and reports provided to him by Frost, which he revalidated and further analyzed as directed by Frost. Working closely with Frost through innumerable revisions and the final version of his dissertation, the plaintiff incorporated therein substantial portions of the reports provided to him by Frost, as was readily apparent to and authorized by Frost, ultimately without citation to said reports.

10. Turner, a member of the university's Engineering Science department and one of the five members of the plaintiff's faculty committee, was aware of the plaintiff's inability to proceed with his initially conceived dissertation, and of plaintiff's preparation of his dissertation based upon data and reports provided by Frost, having been consulted regarding such circumstances by the plaintiff at the times they occurred. The other members of plaintiff's faculty committee were Frost, the committee's chairperson, and Drs. Bruce Bomar ("Bomar"), Frank S. Collins ("Collins"), and Dr. Kenneth Kimble ("Kimble").

11. The plaintiff had been admitted to candidacy for the degree of Doctor of Philosophy with a major in engineering science and mechanics on February 15, 1989, by defendant UT, acting through Minkel, upon plaintiff's request and with the recommendation of the aforementioned members of plaintiff's faculty committee.

12. The plaintiff submitted his completed dissertation to his major professor and faculty committee chairperson, and he in turn distributed it to the other members of his faculty committee in March 1990.

13. On March 27, 1990, the plaintiff defended his dissertation, entitled "Remote Sensing of Turbulence Measurements Using Doppler Lidar and Radar Techniques",

before and upon the examination of the members of his faculty committee, including Frost, Turner, Collins, Bomar and Kimble.

14. Having read the plaintiff's dissertation and orally examined the plaintiff regarding same at his oral dissertation defense, each of the members of plaintiff's faculty committee recommended the dissertation's acceptance in partial satisfaction of the requirements for the degree of Doctor of Philosophy with a major in engineering science that the plaintiff was pursuing, and the dissertation was so submitted to defendant UT's Graduate Council, as chaired by Minkel.

15. At the commencement of his dissertation defense, and during such defense, the plaintiff acknowledged the use of data from experiments conducted by Frost and others, and provided to him by Frost in the preparation of his dissertation.

16. The plaintiff devoted countless hours to the research, analysis, drafting and revisions of his dissertation, foregoing many other activities in the completion thereof. Most of the plaintiff's work in preparing his dissertation was done in Huntsville, Alabama.

17. The plaintiff pursued the course of studies leading to the award of his doctoral degree, including preparation of his dissertation, at the recommendation and with the approval of his supervisor for the enhancement of his job performance as an employee of the United States Army. Plaintiff was afforded time during his usual work hours to work on his dissertation.

18. Having been scrutinized for error and found to "reflect credit [] upon the University and the Graduate School" by defendant UT's Thesis/Dissertation Coordinator/Consultant, as prescribed in the university catalogue, Minkel, acting on behalf of defendant UT's Graduate Council, accepted the plaintiff's dissertation in partial fulfillment of the requirements for the degree of Doctor of

Philosophy with a major in engineering science. Upon such approval, the plaintiff had completed all requirements for the award of such degree to him by defendant UT. Thereafter, having paid a dissertation binding fee, a diploma fee and other graduation fees to defendant UT, defendant UT's Trustees, "on the recommendation of the Faculty", conferred upon the plaintiff the degree of Doctor of Philosophy on May 11, 1990, in witness whereof the plaintiff was issued a diploma bearing the seal of defendant UT and the signatures of the President of the University and the Secretary of the University's Board of Trustees.

19. By letter dated April 4, 1991, Minkel has advised the plaintiff of his plan to proceed with the withdrawal of plaintiff's Doctor of Philosophy degree.

20. Upon information and belief, Minkel is fully aware of the circumstances relating to the plaintiff's dissertation as set forth in the paragraphs hereinabove, having been indirectly so advised by the plaintiff's major professor, Frost, who is retired from defendant UT.

21. In view of Minkel's knowledge of the circumstances pertaining to the plaintiff's preparation of his dissertation, and the acceptance thereof, Minkel's advice to the plaintiff (in the aforementioned letter) that he would formally and officially request that defendant UT's Trustees rescind the plaintiff's doctoral degree absent plaintiff's acquiescence to a formal administrative hearing under the Tennessee Administrative Procedures Act, submission to which would be unduly burdensome both as to expense and time for the plaintiff, is unconscionable. Given his knowledge regarding this matter, Minkel's stated plan to proceed with the withdrawal of plaintiff's doctoral degree absent the plaintiff's submission to a hearing clearly constitutes harassment.

22. On information and belief, defendant UT and responsible representatives thereof were knowledgeable concerning the aforementioned circumstances as to plaintiff's

dissertation prior to the time plaintiff was awarded his doctor of philosophy degree in May 1990, but failed to question plaintiff's entitlement to such degree prior to its award, or to otherwise intervene in order to avert the undue hardship to the plaintiff that the untimely challenge to his work now entails.

23. Plaintiff's professional reputation, in measure, is predicated upon his attainment of a doctoral degree, and such reputation would be substantially impaired and undermined were his degree to be revoked.

24. Plaintiff has already had to forego pursuit of possible beneficial career changes because of the threatened revocation of his doctoral degree.

COUNT I—ESTOPPEL

25. Plaintiff incorporates herein by reference paragraphs 1 through 24.

26. Frost, the plaintiff's major professor, and each of the members of plaintiff's faculty committee, were agents of defendant UT and Minkel. Frost further was an agent of the defendant university's Graduate Council, which body is charged with the responsibility of accepting *vel non* dissertations submitted by UT doctoral candidates.

27. The plaintiff was entitled to rely upon the representations, directions, advice and instruction given to him by Frost regarding the preparation of his dissertation, and did so rely and act thereon in the preparation of his dissertation, including his utilization of the data and reports provided to him by Frost expressly for the purpose of preparing his dissertation.

28. The plaintiff further was entitled to rely on the approval of the members of his faculty committee in given to his dissertation and their recommendation that it be accepted in partial fulfillment of the requirements

for the degree ultimately awarded to him by defendant UT's Trustees, and he did so rely and act upon such approval, paying fees to defendant UT for the binding of his dissertation, his diploma and graduation ceremony expenses.

29. The plaintiff was entitled to rely upon the acceptance of his dissertation by defendant UT's Graduate Council, as given through Minkel, and did so rely and act upon such acceptance, paying to defendant UT fees for the binding of his dissertation, the issuance of his diploma and also for graduation expenses.

30. The plaintiff was entitled generally to rely upon the defendant and its agents with whom the plaintiff worked, in pursuit of his doctoral degree, principally his major professor, Frost, and the other members of his faculty committee, to fairly and truthfully evaluate the work that he did in satisfaction of the requirements for his degree, and further upon the degree issued to him on their approval and recommendation. The plaintiff has so relied and acted upon said approval and the issuance of the degree by holding himself forth as a Doctor of Philosophy with a doctoral degree awarded by defendant UT and its Trustees.

31. The defendant is estopped to deny the plaintiff's satisfaction of all requirements for the doctoral degree that was awarded to him, including his dissertation as submitted, defended and approved, and further to revoke or disparage in any way the degree of Doctor of Philosophy awarded to the plaintiff.

32. Should the defendant not be enjoined from taking any action to revoke or disparage the doctoral degree awarded to the plaintiff, the plaintiff will suffer irreparable harm including but not limited to immeasurable damage to his professional reputation, which damage would be not only irreparable but immediate.

33. No harm even remotely comparable to that which will befall the plaintiff upon defendant's revocation of his degree would be caused to the defendant by forestalling any action to revoke the plaintiff's doctoral degree prior to a final adjudication on the merits of plaintiff's claims.

34. The plaintiff has no adequate remedy at law for the irreparable harm to befall him in the event that the defendant takes action to revoke his degree, as is the stated intention of Minkel.

WHEREFORE, the plaintiff respectfully requests that the Court:

(1) enter a declaratory judgment that the defendant is estopped to deny the plaintiff's satisfactory completion of all requirements for the degree of Doctor of Philosophy awarded to him and to take any action in revocation or disparagement of the said degree;

(2) enter a preliminary injunction and a permanent injunction restraining the defendant from taking any action to revoke or otherwise disparage the Doctor of Philosophy degree awarded to the plaintiff;

(3) enter such other order as the Court deems necessary, appropriate and fair in order to do substantial justice in this action.

COUNT II—BREACH OF CONTRACT

35. Plaintiff incorporates by reference paragraphs 1 through 34 hereinabove.

36. A contract, both express and implied, existed between the plaintiff and defendant UT whereby the plaintiff was obliged to pay tuition and fees and satisfactorily complete all requirements of the doctoral degree program to which he was admitted, in exchange ultimately for defendant UT's, through its Trustees, award of the Doctor of Philosophy degree to him.

37. The plaintiff fully and satisfactorily performed all obligations required under his aforementioned agreement with defendant UT and the university, through its Trustees, in turn awarded him the degree of doctor of philosophy.

38. Minkel has advised the plaintiff of the intention to breach the aforementiond agreement with him by revoking the acceptance of his performance and the reciprocal performance of awarding the Doctor of Philosophy degree to him.

39. Absent restraint of the defendant's breach, the plaintiff will suffer immediate and irreparable harm as addressed hereinabove.

WHEREFORE, the plaintiff respectfully requests that the Court:

(1) enter a declaratory judgment that the defendant's denial of the plaintiff's satisfactory completion of all requirements for the degree of Doctor of Philosophy awarded to him, and any action in advancement of the revocation or disparagement of the said degree, is a breach of the contract between defendant UT and the plaintiff;

(2) enter a preliminary injunction and a permanent injunction restraining the defendant from taking any action to revoke or otherwise disparage the doctor of philosophy degree awarded to the plaintiff;

(3) alternatively, enter a judgment in favor of the plaintiff against defendant UT for damages according to proof;

(4) enter such order as the Court deems necessary, appropriate and fair in order to do substantial justice in this action.

COUNT III—FRAUD

40. Plaintiff hereby incorporates by reference paragraphs 1 through 39 above in full.

41. Assuming *arguendo* that the requirements for plaintiff's dissertation were other than as represented to him by his major professor and impliedly by those other UT faculty members who approved his dissertation with knowledge of the facts and circumstances of its preparation and submission, then said faculty members, acting as agents of the defendant, either intentionally or innocently misrepresented such requirements to the plaintiff.

42. The plaintiff reasonably relied upon the representations, including directions, instructions and advice, given by his major professor, a tenured faculty member of the defendant university, in preparing and submitting his dissertation in partial fulfillment of the degree requirements of the doctoral program in which he was enrolled, and incurring costs associated therewith and other expenses for issuance of the degree and his graduation.

43. The plaintiff further relied upon the approval and recommendation for acceptance of his dissertation in partial satisfaction of the degree requirements, as made by C. W. Minkel, and the members of his faculty committee, in incurring costs associated therewith and other expenses for issuance of the degree and his graduation.

44. The plaintiff further has reasonable relied upon the representation made to him and others implicitly in the degree awarded to him by the defendant.

45. The plaintiff's reliance as heretofore averred is to his substantial detriment and damage if the defendant takes any further action to revoke or otherwise disparage the doctoral degree awarded to plaintiff.

WHEREFORE, the plaintiff respectfully request that the Court:

(1) enter a declaratory judgment that the defendant's denial of the plaintiff's satisfactory completion of all requirements for the degree of Doctor of Philosophy awarded to him and any action in revocation or disparagement of the said degree is a fraud upon the plaintiff;

(2) enter a preliminary injunction and a final injunction restraining the defendant from taking any action to revoke or otherwise disparage the Doctor of Philosophy degree awarded to the plaintiff;

(3) alternatively, enter a judgment in favor of plaintiff and against defendant for compensatory and punitive damages according to proof;

(4) enter such other order as the Court deems necessary, appropriate and fair in order to do substantial justice in this action.

/s/ James H. Richardson
JAMES H. RICHARDSON
Attorney for Plaintiff

/s/ John J. Callahan, Jr.
JOHN J. CALLAHAN, JR.
Attorney for Plaintiff

BELL, RICHARDSON & SPARKMAN, P.A.
116 South Jefferson Street
Post Office Box 2008
Huntsville, Alabama 35804-2008
Telephone: (205) 533-1421
FAX: (205) 536-8995

STATE OF ALABAMA
COUNTY OF MADISON

I, Dennis Allen Faulkner, being first duly sworn, depose and say:

I am a resident citizen of Madison County, in the State of Alabama. I am a plaintiff in the above-styled and-numbered civil action. I have read the foregoing Complaint. The factual averments thereof are true and correct to the best of my information, knowledge and belief.

/s/ Dennis Allen Faulkner
DENNIS ALLEN FAULKNER

Sworn to and subscribed before me this 5th day of May, 1991.

/s/ [Illegible]
Notary Public
My Commission Expires:
9-10-94

IN THE CIRCUIT COURT
OF MADISON COUNTY, ALABAMA

Civil Action No. CV 91-960-B

DENNIS ALLEN FAULKNER,
Plaintiff,

vs.

THE UNIVERSITY OF TENNESSEE,
Defendant.

FIRST AMENDMENT TO VERIFIED COMPLAINT

Plaintiff hereby amends his Amended Verified Complaint to substitute the following, as indicated. All other averments of said Amended Verified Complaint are otherwise ratified and reaffirmed in all respects.

COUNT II—BREACH OF CONTRACT

* * * *

39. Defendant has thereby anticipatorily breached its contract with plaintiff, and plaintiff has suffered injury and damage as a proximate result thereof. Absent restraint by the Court, defendant's intended course of conduct will proximately result in further injury and damage to plaintiff. Such injury and damage constitutes immediate and irreparable harm.

WHEREFORE, the plaintiff prays the following relief:

(1) That the Court enter declaratory judgment, that the defendant is estopped to take action to revoke or invalidate plaintiff's degree, and that defendant's conduct to the contrary is in breach of its contractual obligations to plaintiff;

(2) That the Court restrain the defendant from taking any action to revoke or invalidate plaintff's degree, or to otherwise disparage plaintiff or his successful completion of the requirements for the award of such degree;

(3) That the plaintiff be awarded such other and further relief, at law and in equity, as the Court deems necessary and appropriate under the circumstances of this action; and

(4) That the plaintiff be awarded damages in excess of Ten Thousand Dollars ($10,000.00) according to proof, plus interest, and the costs of this action.

COUNT II—FRAUD

* * * *

46. As a proximate consequence of the fraudulent conduct of the defendant, plaintiff has been caused to suffer extreme emotional distress and mental anguish, and has otherwise been caused to lose the enjoyment of life.

47. Defendant's conduct as aforesaid was so extreme, outrageous and oppressive, so frought with malice, and consistent with such a pattern of similar conduct as to justify the imposition of punitive damages.

WHEREFORE, plaintiff prays the following relief:

(1) That plaintiff be awarded compensatory and punitive damages in excess of Ten Thousand Dollars according to proof, plus the costs of this action;

(2) That the Court enter such declaratory and injunctive relief as to declare and restrain the defendant's fraudulent misconduct; and

(3) That the plaintiff be awarded such other and further relief, at law and in equity, as the Court deems necessary and appropriate under the circumstances of this action.

/s/ JAMES H. RICHARDSON
JAMES H. RICHARDSON
Attorney for Plaintiff

/s/ John J. Callahan, Jr.
JOHN J. CALLAHAN, JR.
Attorney for Plaintiff

Of Counsel:

BELL, RICHARDSON & SPARKMAN, P.A.
116 South Jefferson Street
P. O. Box 2008
Huntsville, Alabama 35804-2008
Telephone: (205) 533-1421

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing to be served upon Gary C. Huckaby, Esquire and Frank M. Caprio, Esquire, by hand delivery this 25th day of June, 1991.

/s/ James H. Richardson
JAMES H. RICHARDSON

IN THE CIRCUIT COURT
OF MADISON COUNTY, ALABAMA

Civil Action No. CV91-0960B

DENNIS ALLEN FAULKNER,
Plaintiff,

v.

THE UNIVERSITY OF TENNESSEE,
Defendant.

AMENDED MOTION OF THE UNIVERSITY OF TENNESSEE TO DISMISS

The purported defendant, The University of Tennessee, appearing specially for the purpose of filing this motion and not otherwise, moves the Court to dismiss the complaint in this cause and to quash the summons issued to this purported defendant and assigns the following as grounds:

1. This Court lacks jurisdiction over this defendant.

2. This defendant is an agency of the State of Tennessee, a separate sovereign, and is not subject to the jurisdiction of this Court.

3. This Court lacks jurisdiction of the defendant due to its sovereign immunity.

4. This Court lacks jurisdiction over the subject matter of the complaint.

5. The matters raised by the plaintiffs in his complaint occurred within the State of Tennessee, and this Court lacks jurisdiction over such matters.

6. Any acts of this defendant which involve the plaintiff were performed by the defendant as an arm or part

of the State of Tennessee, and this Court does not have jurisdiction thereof.

7. This defendant has not had sufficient minimum contacts with the State of Alabama to subject it to the jurisdiction of this or any other court in the State of Alabama.

8. The exercise of jurisdiction by this Court would offend the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

9. The exercise of jurisdiction over this defendant is barred by the Constitution of the United States and the Constitution of the State of Tennessee and the State of Alabama.

10. Jurisdiction of this defendant is due to be denied under the doctrines of comity and full faith and credit to which the acts and proceedings of another sovereign state are entitled.

11. The plaintiff has failed to exhaust his administrative remedies, and the alleged claims are thus not ripe for adjudication.

12. The Tennessee Administrative Procedures Act, Tennessee Code Ann. § 4-5-301, *et seq.* (Supp. 1990), provides an adequate remedy to the plaintiff, which he has not exhausted. In fact, such administrative procedures have not even been invoked by the plaintiff.

13. The Tennessee Administrative Procedures Act is the sole and exclusive remedy to the plaintiff under the allegations of his complaint.

14. This Court should abstain from exercising jurisdiction in this matter.

15. The complaint fails to state a claim upon which relief can be granted.

16. The complaint fails to state a claim upon which relief can be granted for the reasons designated in paragraphs 1 through 15 of this Motion to Dismiss.

17. The plaintiff has not suffered nor has he adequately averred that he has suffered irreparable harm.

18. It affirmatively appears that the plaintiff has an adequate remedy at law.

/s/ Gary C. Huckaby
GARY C. HUCKABY

/s/ Frank M. Caprio
FRANK M. CAPRIO

Of Counsel:

BRADLEY, ARANT, ROSE & WHITE
223 East Side Square
Huntsville, Alabama 35801
(205) 533-5040

/s/ Alice Woody
ALICE WOODY

Of Counsel:

Office of General Counsel
The University of Tennessee
719 Andy Holt Tower
Knoxville, Tennessee 37996-0170
(615) 974-3245

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing on James H. Richardson, Esquire, Post Office Box 2008, Huntsville, Alabama 35804, by placing a copy of same in the United States Mail, first-class postage prepaid and addressed to his regular mailing address, on this 10th day of June, 1991.

/s/ Frank M. Caprio
Of Counsel

IN THE CIRCUIT COURT
FOR MADISON COUNTY, ALABAMA

Civil Action No. CV91-0960B

DENNIS ALLEN FAULKNER,
Plaintiff,

v.

THE UNIVERSITY OF TENNESSEE,
Defendant.

AFFIDAVIT OF C.W. MINKEL IN SUPPORT OF THE DEFENDANT'S MOTION TO DISMISS

Before me, the undersigned authority, personally appeared C.W. Minkel, and after first being duly sworn, did dispose and say, under oath, as follows:

1. My name is C. W. Minkel. I reside at 5704 Crestwood Drive, Knoxville, Tennessee and am over 21 years of age. This affidavit is given in support of a Motion to Dismiss filed by the University of Tennessee in the above-styled case. My statements herein are based upon personal knowledge, except where it is specifically stated that they are based upon information and belief.

2. The University of Tennessee is a public University for the State of Tennessee. It was created, organized, and exists by virtue of the laws of the State of Tennessee.

3. I am the Associate Vice Chancellor for Academic Affairs and Dean of the Graduate School of the University of Tennessee, Knoxville. I have been Dean of the Graduate School since September 1979. In my position as Associate Vice Chancellor and Dean, I have overall responsibility for the Graduate School of the University

of Tennessee, Knoxville. The plaintiff, Dennis Faulkner, was enrolled in the Graduate School to pursue a doctoral degree in Engineering Science and Mechanics.

4. Dennis Faulkner enrolled in the Engineering Science and Mechanics Doctoral Program in January 1987. To complete the program successfully and earn the degree of Doctor of Philosophy (PhD.), a student must complete all required course work, pass a qualifying examination, pass a comprehensive examination, and prepare a dissertation based on original research. Additionally, the student must defend the original research exhibited in the dissertation before the student's committee and comply with any other requirements listed in the graduate catalog.

The student's dissertation must illustrate knowledge of the field, be a significant contributon to such knowledge, and must be the student's own work. There must be proper acknowledgement of cited works. Any material taken from another source must be documented, and in no case may a person present another's work as one's own.

5. Parts of four prior documents prepared by F.W.G., Associates, a company owned by Walter Frost, Dennis Faulkner's major professor, were combined into a document, without reference to the prior documents and submitted as Dennis Faulkner's dissertation. Therefore, plaintiff failed to prepare a dissertation based upon his own original research and failed to cite the sources of the materials incorporated into the dissertation. Furthermore, he presented other people's work as his own. This conduct is a violation of the Standards of Conduct in effect at that time and which have remained in effect, which specifically prohibit academic cheating and plagiarism. The Standards of Conduct are part of the official rules of the University of Tennessee, Knoxville, promulgated under the Tennessee Administrative Procedures Act, T.C.A. § 4-5-201 *et seq.*

6. The University of Tennessee, after the review of plaintiff's dissertation and comparing his dissertation to the four prior documents, decided to take action to rescind the plaintiff's degree. By letter dated April 4, 1991, the plaintiff was notified of the four documents of which his dissertation appears to be essentially a verbatim copy, and was offered an opportunity to surrender his PhD. diploma and his copy of the dissertation voluntarily. He was informed that if he did not agree to surrender his dissertation and diploma, he could elect to have a hearing under the contested case provisions of the Tennessee Administrative Procedures Act, T.C.A. § 4-5-301 *et seq.*, and that he had a right to be represented by legal counsel at the hearing. A copy of the letter of April 4, 1991, is attached as Exhibit 1.

/s/ C. W. Minkel
C. W. MINKEL

STATE OF TENNESSEE)
) ss:
COUNTY OF KNOX)

Sworn to and Subscribed before me this 23 day of May, 1991.

/s/ Alice M. Woody
Notary Public

My Commission Expires Sept. 18, 1994

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing on James H. Richardson, Esquire, Post Office Box 2008, Huntsville, Alabama 35804, by placing a copy of same in the United States Mail, first-class postage prepaid and addressed to his regular mailing address, on this 13th day of June, 1991.

/s/ Frank M. Caprio
FRANK M. CAPRIO
Of Counsel

EXHIBIT 1

THE UNIVERSITY OF TENNESSEE
KNOXVILLE

The Graduate School — Office of the Dean

4 April 1991

Dr. Dennis A. Faulkner
114 Dreger Avenue
Huntsville, Al 35801

Dear Dr. Faulkner:

This is in follow-up to our recent telephone conversations and to notify you officially that we do plan to proceed with the withdrawal of your Doctor of Philosophy degree, awarded in May 1990, unless you can demonstrate clearly that the dissertation represents your original work, and includes proper citation of any documents used in its preparation.

The basis for the above action is that the text of your dissertation entitled *Remote Sensing of Turbulence Using Doppler Lidar and Radar Techniques* appears to be essentially verbatim copy of material from the following earlier reports:

Frost, Walter and K.H. Huang. *Doppler Lidar Signal and Turbulence Study,* Final Report, Contract NAS8-35185, Prepared for NASA, Marshall Space Flight Center, Alabama, 23 December 1983.

Huang, Kao-Huah, Walter Frost and Erik A. Ringnes. *Comparison of Wind and Turbulence Measurements from Doppler Lidar and Instrumented Aircraft,* Final Report, Contract NAS8-36188, Prepared for NASA, Marshall Space Flight Center, Alabama, 18 June 1985.

Chang, Ho-Pen and Walter Frost. *Development of a Microburst Turbulence Model for the Joint Airport Weather Studies Wind Shear Data,* for Research Applications Program, National Center for Atmospheric Research, Boulder, Colorado, March 1987.

Camp, Dennis W. and Walter Frost, Eds. *Atmospheric Turbulence Relative to Aviation, Missile, and Space Programs,* NASA Conference Publication 2468, Proceedings of a workshop sponsored by the National Aeronautics and Space Administration and Department of Defense at Langley Research Center, Hampton, Virginia, 2-4 April 1986, NASA, 1987.

Following review of your dissertation and the above reports the tenured faculty members of the Engineering Science and Mechanics Department at both UTK and UTSI and the tenured faculty of the Mechanical and Aerospace Engineering Department at UTSI judged your dissertation to lack evidence of original work and to constitute essentially a duplication of material in the above reports. This evaluation, which notes also the absence of any citation of the reports in your dissertation, has led the faculty members to conclude that this is a case of plagiarism and to recommend that the University initiate proceedings to rescind your degree.

From our perspective the revocation of your dissertation can proceed in either of two ways:

1. You may choose to return the Ph.D. diploma and your copy of the dissertation, with a note acknowledging that you are voluntarily returning these items.

2. We can formally and officially request that your degree be rescinded by the UT Board of Trustees.

In either case, a notation would be placed on your transcript to the effect that the degree has been rescinded.

If you do not concede the correctness of our position, and wish to contest it and our intended action, you have the right to a hearing. Should you elect to receive a hearing, you have the right to be heard in accordance with the contested case provisions of the Tennessee Administrative Procedures Act, Tennessee Code Annotated SS 4-5-301, et seq. Also, you have the right to be represented by legal counsel, so long as you provide notice of your desire to be so represented concurrent with your notice of desire to receive a hearing. Should you elect to be represented by legal counsel, an attorney will also be present to represent the University.

We are willing to delay action until 19 April, if necessary, to allow you adequate time to respond. Please let us hear from you no later than that date. Thank you.

Sincerely,

/s/ C. W. Minkel
C. W. MINKEL
Associate Vice Chancellor and
Dean of The Graduate School

IN THE SUPREME COURT OF ALABAMA

Case No. 1901558

DENNIS ALLEN FAULKNER,
Appellant,

v.

THE UNIVERSITY OF TENNESSEE,
Appellee.

MOTION FOR PERMISSION TO APPEAR AS AMICI CURIAE AND LETTER BRIEF OF AMICI CURIAE IN SUPPORT OF APPLICATION FOR REHEARING

AUBURN UNIVERSITY (hereinafter AUBURN) and THE UNIVERSITY OF ALABAMA (hereinafter ALABAMA) request permission to enter an appearance as amici curiae and to submit a letter brief in support of the application for rehearing by THE UNIVERSITY OF TENNESSEE. As an institutions of higher learning in Alabama and instrumentalities of the state of Alabama, AUBURN and ALABAMA have a perspective on certain issues which might be of value to the Court.

Whether The University of Tennessee is conducting education programs in the State of Alabama for some of its citizens to a degree or in a number sufficient to subject it to the jurisdiction of Alabama's courts is a legitimate and important question for Alabama's courts to resolve. It is not one that AUBURN or ALABAMA seek to address in this brief. AUBURN and ALABAMA feel, however, that they should comment upon those aspects of the Court's decision concerning exhaustion of remedies and sovereign immunity and the relationship between aca-

demic decisions and judicial review because the ruling of the Court should have negative implications for these institutions, which are not intended by the Court.

AUBURN and ALABAMA believe that fundamentally academic decisions should first be consigned to academic institutions and that the law should require exhaustion of all administrative or institutional remedies and procedures before entertaining judicial action. The granting or revoking of an academic degree is the quintessential academic decision. The United States Supreme Court has recognized that "[c]ourts are particularly ill-equipped to evaluate academic performance." *Board of Curators, University of Missouri v. Horowitz,* 435 US 78,92, 55LEd 2d 124,136, (1978). The plaintiff's invitation to the courts to substitute their judgment for that of academic faculty should only be accepted with great hesitation.

In addition, AUBURN and ALABAMA have a compelling interest in attempting to ensure that foreign jurisdictions recognize the sovereign immunity of this state. AUBURN and ALABAMA, like most large universities have occasion to conduct substantial activity outside the state of Alabama. To the extent that Alabama courts fail to recognize the immunity afforded foreign states under their law, we can expect foreign forums to fail to recognize Alabama immunity when litigation is brought against Alabama in a foreign jurisdiction. The public policy of Alabama and Tennessee is the same with respect to the issue of sovereign immunity. Therefore, there is no clash of conflicting public policy of the respective states. As a matter of comity, the Court should recognize the sovereign immunity of other state instrumentalities at least to the exent that those states recognize the immunity of instrumentalities of the State of Alabama. The courts of Tennessee have apparently recognized the immunity of Alabama. *Moore v. Tate,* 112 S.W. 935 (Tenn. 1889).

We recognize that this Court's opinion, as issued on August 28, 1992, does not appear to specifically address

the ultimate application on the doctrine of sovereign immunity. Such immunity should be available to the instrumentality of any state which has provisions analogous to Article I, Section 14 of the Alabama Constitution of 1901 nor does this Court's decision necessarily implicate the traditional hesitancy to permit or encourage judicial review of purely academic decisions. However, we are concerned that even of the Court decides to continue its reversal of the jurisdictional dismissai below, the silence of the decision of these issues might be misunderstood by lower courts and litigants to imply more breadth to this decision than the court intended.

Therefore, we respectfully urge the Court to reconsider its decision in this case, and to affirm the trial court. Alternatively, we urge the Court to consider amending its decision to reflect the fact that this reversal does *not* constitute a holding that the agencies of other states will be deprived of their eleventh amendment immunity under the United States Constitution, or their state constitutional immunity analogous to Article I, Section 14, Alabama Constitution of 1901, by Alabama courts, and further that Alabama courts recognize and value the wisdom of the policy of judicial restraint articulated in *Horowitz*.

Office of General Counsel
101 Samford Hall
Auburn University, Al
36849

/s/ Thomas D. Samford, III
THOMAS D. SAMFORD, III
General Counsel

/s/ Lee F. Armstrong
LEE F. ARMSTRONG
University Counsel

General Counsel
University of Alabama
System
401 Queen City Avenue
Tuscaloosa, AL 35401

/s/ C. Glenn Powell
C. GLENN POWELL
General Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing Letter Brief of Amicus Curiae In Support of Application for Rehearing on James H. Richardson, Esquire, and John J. Callahan, Jr., Esquire, Post Office Box 2008, Huntsville, Alabama 35804, and Gary C. Huckaby, Esquire, and Frank M. Caprio, Esquire, 200 Clinton Avenue, West Suite 900, Huntsville, Alabama 35801, by placing a copy of same in the United States Mail, first-class postage prepaid and addressed to their regular mailing addresses, on this 17th day of September, 1992.

/s/ Lee F. Armstrong
University Counsel

IN THE CIRCUIT COURT
OF MADISON COUNTY, ALABAMA

Civil Action No. CV 91-960B

DENNIS ALLEN FAULKNER,
Plaintiff,

VS.

THE UNIVERSITY OF TENNESSEE,
Defendant.

STATE OF ALABAMA
COUNTY OF MADISON

AFFIDAVIT OF DENNIS ALLEN FAULKNER

Before me the undersigned officer, authorized by law to administer oaths in and for said county and state, personally appeared Dennis Allen Faulkner, who being known to me and being by me first duly placed under oath, does swear and depose as follows:

My name is Dennis Allen Faulkner, Ph.D. I am the plaintiff in the above lawsuit. I received my Doctorate degree in Engineering Science and Mechanics from the University of Tennessee ("UT"), through the University of Tennessee Space Institute ("UTSI"), headquartered in Tullahoma, Tennessee. I make this affidavit upon my own personal knowledge, and would so testify if called upon to do so in open court.

I was enrolled in the doctoral program at UTSI between 1987 and 1990. Dr. Walter Frost was my "major professor," or advisor and chairman of the authorized committee for my doctorate program at all times during my enrollment at UTSI. I have personal knowledge of the conduct of programs by UTSI

in the Huntsville, Alabama area for the years during which I was enrolled at UTSI, which is one of the campuses which UT operates. Programs offered at UTSI are listed in the UT catalog as a part of the UT curriculum. Attached hereto as Exhibit A is a true and accurate copy of certain portions of the UT Catalog Graduate for 1989-1990. Attached as Exhibit B is a true and accurate copy of portions of the UTSI course offerings listed in its Registration Announcement for the Fall Semester of 1989, during which time I was enrolled there.

UTSI, at all times during my enrollment there, and since then up to the present time, has maintained a number of graduate programs in the Huntsville, Alabama area. These offerings are recommended to the employees of the Department of the Army working at Redstone Arsenal, and to the best of my knowledge are also recommended to the employees of NASA working at Marshall Space Flight Center. I was working at Redstone Arsenal for the Army when I was recruited by Dr. Walter Frost to enroll in the doctoral program at UTSI. The basis for the recruitment, and the central factor in my interest in the UTSI program, was the fact that I could take classes and do my course work and dissertation preparation in Huntsville. It was not required that I have any period of residency at Tullahoma or Knoxville, Tennessee. Rather, I could stay on my job during the work day and earn my Ph.D. degree while making a living for my family. I personally know of at least thirteen (13) students other than me who took courses through UTSI while working in Huntsville for the Army, NASA, or for various government contractors.

I did all of my coursework in the UTSI program while situated in Huntsville, Alabama. Classes were taught by UTSI in Huntsville through video tapes, which are shipped from both Knoxville and Tulla-

homa, Tennessee to Huntsville and are viewed by students enrolled in UT programs. UTSI also has professors who teach classes in person in Huntsville, and I took several "live" classes in Huntsville taught by Dr. Frost. A number of other UTSI professors teach classes "live" in Huntsville. In addition, I worked on my doctoral dissertation in the UTSI program primarily in Huntsville, Alabama. To the best of my recollection, the only contacts I had with the State of Tennessee, from the date I was recruited to UTSI through the date I received my diploma, were ten (10) trips to Tullahoma and two (2) to Knoxville. No trip lasted over a day. I went to Tullohoma once for an interview and diagnostic examination, once for the qualifying examination, once to take my qualifying exams, five times to enroll in classes for various quarters (although later I enrolled from Huntsville), twice for exams (in two classes), and once for the defense of my dissertation. I went to Knoxville only to deliver the dissertation for review and approval for graduation, and to attend graduation itself, which was voluntary. Otherwise, for three years, all the work that led to my Ph.D. degree, which was in fact issued by UT, was done in the Huntsville area. The dissertation, furthermore, was approved both by my major professor, Dr. Frost, and unanimously by the entire faculty committee designated by UT to approve or reject my work.

Upon information and belief, UTSI is involved in contracts with NASA and the Army in Huntsville. I am also personally aware that UTSI has other business dealings in the Huntsville, Alabama technical community. UTSI is an active participant in, and sponsor of, the Technical and Business Exhibition and Symposium (TABES). TABES is an annual trade show for the high-tech community, and takes place every Spring in Huntsville. Attached hereto as Exhibit C is a true and accurate copy of the program

which I received for the May, 1991 show. Listed as participants are a number of individuals connected with UTSI, including Dr. Wesley L. Harris, the current Vice President for UTSI, who is noted as the Chairman for TABES in 1992.

I am not a resident of the State of Tennessee. I am a resident of the State of Alabama. I live in Huntsville. I neither vote nor pay taxes in the State of Tennessee. I would not have enrolled in the UTSI program if I had been advised that I would have to travel to Tennessee to do my course and dissertation work. I do not have the resources to go to court to defend the degree which I legitimately earned. As a citizen of the State of Alabama, I have no voice in the processes that control UT. Furthermore, my witnesses and documents are principally located in Huntsville, and I do not believe the Tennessee court process affords me any practical remedy.

I learned of the efforts at UT to remove my Ph.D. degree first through a telephone call from C. W. "Bud" Minkel, who is the Associate Vice Chancellor for Academic Affairs and Dean of the Graduate School for UT. Minkel called me from Knoxville to tell me that UT had decided to invalidate my degree, although I had not been contacted or given an opportunity to present the facts that my major professor and faculty committee had approved my work. Dr. Frost—whose work I had supposedly plagiarized—had given me express permission to use his previous studies and to incorporate them into my dissertation in the very manner in which I did. Dr. Frost was not contacted by UT prior to Dr. Minkel's decision to revoke my degree. Dr. Minkel gave me two choices: to surrender my diploma voluntarily, or the Trustees of UT would take my degree away and I could come to Tennessee and face the "embarrass-

ment" of a public hearing which he implied would not change the result. I was not offered any internal review, and Minkel refused to meet with me to discuss the matter. I took this as a threat.

I was not offered the "due process" hearing afforded students to seek internal review of faculty decisions before they become official. Rather, I was only offered a "star chamber" review by UT, in Tennessee, under its Administrative Procedures Act, after my degree was removed. My job status will be immediately and irreparably harmed if my Ph.D. degree is invalidated in any way, and I stand to lose a valuable security clearance, none of which would be restored even if UT later reversed its decision. Tennessee administrative remedies would therefore be futile and inadequate, and would cause me to suffer irreparable harm in the meantime.

/s/ Dennis Allen Faulkner
DENNIS ALLEN FAULKNER

Sworn to and subscribed before me this 16th day of June, 1991.

/s/ James H. Richardson
Notary Public
My Commission Expires:
5-4-94

[SEAL]